Supreme Court, U.S.
FILED
JUN 17 1996
CLERK

No. 95-1884

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

KELSEY HAYES COMPANY,
Cross-Petitioner,
v.

JOSEPH GOLDEN, ANGELO DEITOS, EDWARD JONES, LUTHER PALMER, CAROLINE FORYS, JOSEPHINE THOMAS, ARTHUR SALLIS, THELMA SONGER, JOHN W. GALLOWAY and ROGER FARRAR, on behalf of themselves and a class of persons similarly situated,
Cross-Respondents.

On Cross Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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CROSS-RESPONDENTS' BRIEF IN OPPOSITION

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27 pp

COUNTER-STATEMENT OF QUESTION PRESENTED

In an action arising under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, should a preliminary injunction be upheld when the plaintiff-retirees have demonstrated the requisite "likelihood of success on the merits" of their claim that, applying traditional contract interpretation principles, the labor contracts at issue obligated the defendant-employer to provide medical benefits throughout the retirees' retirement?

PARTIES BELOW

Cross-Petitioner Kelsey-Hayes Company is a Defendant in the District Court. It was an Appellant in the Court of Appeals. It was also a Respondent in the Petition for Writ of Mandamus in the Court of Appeals. It is a Respondent to the Petition for Writ of Certiorari in Case No. 95-1674 before this Court.

Cross-Respondents Joseph Golden, Angelo Deitos, Edward Jones, Luther Palmer, Carolyn Forys, Josephine Thomas, Arthur Sallis, Thelma Songer, John W. Galloway, and Roger Farrar are Plaintiffs in the District Court. They were Appellees in the Court of Appeals. They were also Petitioners for a Writ of Mandamus in the Court of Appeals and are Petitioners for a Writ of Certiorari in this Court, Case No. 95-1674. John Hoyle, who was a Plaintiff in the District Court, died after this action was filed. He was replaced by Stephen Santangelo who is not a Cross-Respondent here. Ida Thomason was a Plaintiff in the District Court. She was dismissed without prejudice by the District Court and is not a Cross-Respondent here.

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CROSS-RESPONDENTS' BRIEF IN OPPOSITION

COUNTER STATEMENT OF THE CASE

Cross-Respondents are a class of retired former employees and surviving spouses of retired employees of the Cross-Petitioner Kelsey-Hayes Company.[1] During their

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[1] In the decision below, the Sixth Circuit addressed two issues. *First*, the court affirmed the district court's decision that the plaintiff retirees were not entitled to a jury trial on their claim under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185. That decision is the subject of a Petition for Writ of Certiorari filed by the retirees, Case No. 95-1674. *Second*, the Sixth Circuit

employment at Kelsey-Hayes, Cross-Respondents were represented by the International Union, United Automobile, Aerospace and Agricultural Workers of America (UAW), and their terms and conditions of employment were governed by a series of collective bargaining agreements negotiated by the UAW and Kelsey-Hayes. The Class is composed of hourly retirees from five separate Kelsey-Hayes facilities, along with surviving spouses and eligible dependents.

Since the 1960's, the collective bargaining agreements obligated Kelsey-Hayes to provide continued medical benefits to retired former employees. Although the language in the labor agreements from the five facilities varies to some extent, in each case that language links the Company's obligation to eligibility for pension benefits. For example, the agreement covering the SPECO facility provides that "[t]he Company shall contribute the full premium . . . for Health Care . . . for . . . [a] retired employee and his eligible dependents, if any, provided such retired employee is eligible for benefits under [the pension plan]." (Cross-Pet. App. 4a). The agreement covering the Gunite facility provided that "[t]he Company will pay the full cost of hospital and medical expense coverages of currently enrolled pensioners and their eligible dependents and future pensioners provided the pensioner is eligible for benefits under Gunite Pension Plan." (Cross-Pet. App. 10a).

Summary Plan Descriptions prepared and distributed by Kelsey-Hayes to employees and retirees contained the following language:

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affirmed the District Court's grant of a preliminary injunction to the retirees, requiring Kelsey-Hayes to continue the medical benefits at issue during the litigation. Kelsey-Hayes has filed a conditional Cross-Petition on that question, Case No. 95-1884. This Brief in Opposition addresses only Kelsey-Hayes' Cross-Petition.

The decision of the Sixth Circuit, dealing with both issues, is contained in the Appendix to the Petition for Writ of Certiorari filed in Case No. 95-1674 (hereafter Pet. App.).

> When you are retired and are receiving benefits under the Pension Plan . . . all of your Health Care Coverages are continued without cost to you.
>
> Kelsey-Hayes also pays the full cost of Health Care coverages for surviving spouses and eligible children of deceased pensioners . . . . (Cross-Pet. App. 12a).

The Summary Plan Descriptions also make special provisions for individuals who retire at age 65 or older without sufficient service to receive a pension benefit. In those circumstances, there is no lifetime pension benefit to which to link the receipt of continuing medical coverage. As to those persons, the SPD's state explicitly that "all of your Health Care coverages . . . will be continued for the rest of your life without cost to you." (Cross-Pet. App. 13a).

The labor agreements also contain general durational language, requiring re-negotiation every three years. (Cross-Pet. App. 3a). That language does not make any reference to the rights of individuals who have already retired, or to Kelsey-Hayes' obligations to those individuals.

When Kelsey-Hayes sold three of the five facilities in 1987, it agreed to retain resposibility for the retiree medical benefits for those individuals who had already retired from those facilities. (Pet. App. 14a, 60a). In order to support that liability, Kelsey-Hayes posted a $20 million multi-year letter of credit to the purchaser of two of the facilities who assumed the labor agreements. (*Id.*). Kelsey-Hayes continued to provide retirees with medical benefits for the next six years, until it implemented the modifications challenged here. (Pet. App. 62a).

In April of 1993, Kelsey-Hayes announced to its retires that, effective January 1, 1994, their medical benefits would be reduced in several significant ways. First, retirees would be required to make monthly contributions —over $80 per month per person in some cases—in order to continue to receive their coverage. Second, co-pays

and deductibles would be imposed, which in the aggregate could cost each family as much as an additional $4,000 per year depending on utilization. (Pet. App. 54a). Third, a new "lifetime cap" on benefits was added. Fourth, Kelsey-Hayes would no longer reimburse the retirees for part of the cost of the monthly Medicare Part B premium.

Kelsey-Hayes did not bargain with the UAW over these intended changes, or obtain the consent of the UAW or the retirees before announcing or implementing them.

Following the announcement of these intended changes, the present lawsuit was filed on November 12, 1993 by a group of named Plaintiffs on behalf of the class of affected Kelsey-Hayes retirees and surviving spouses whose right to benefits flowed from the collective bargaining agreements negotiated by the UAW and Kelsey-Hayes. The action was brought under § 301(a) of the Labor Management Relations Act of 1947, which provides for "suits for violation of contracts between an employer and a labor organization." 29 U.S.C. § 185(a). A parallel count under § 502(a)(1)(B) of ERISA was included. That section of ERISA provides for suits by participants in employee benefit plans "to recover benefits due" or to "enforce . . . rights under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B).

On December 23, 1993, the retirees filed a motion for preliminary injunction. The benefit reduction went into effect, as announced, on January 1, 1994. Following a hearing held on March 10, 1994, the district court granted the retirees' motion for preliminary injunction.[2]

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[2] The injunction covered class members at the three sold facilities. The other two facilities are still owned by Kelsey-Hayes and Hayes Wheels International, Inc. In February, 1994, prior to the hearing on the preliminary injunction, these two companies agreed, during negotiations with the UAW, to reinstate most of the benefits without prejudice to the parties' positions in this action. (Pet. App. 4a).

After reviewing the allegations of the parties in detail, the district court summarized its findings on the contract interpretation question as follows:

> each of the collective bargaining agreements provides that eligibility for retiree health benefits is tied to eligibility for lifetime pension benefits or survivor spouse income. The summary plan descriptions indicate that retiree benefits were intended to last for the life of the retiree, without cost, regardless of the termination of the collective bargaining agreement. Defendant's conduct also indicates that plaintiffs' benefits were vested. After defendant sold its three divisions, it continued for six year to pay the full cost of retiree health benefits. Combined, all of these facts indicate that plaintiffs' retiree health benefits were intended to last for their lifetimes without modification. (Pet. 62a).

The district court therefore found that the retirees had demonstrated the requisite "likelihood of success on the merits" on their claim that the contracts at issue did not permit unilateral modification of the retiree medical benefits. Finding that all of the other necessary factors for preliminary injunctive relief were also present, the district court granted the retirees' motion for preliminary injunction.

Following Kelsey-Hayes' appeal, the Sixth Circuit reviewed the decision of the district court and concluded that the district court had not abused its discretion in granting preliminary injunctive relief. On the question of "likelihood of success on the merits," the Sixth Circuit first dealt with the language of the labor contracts themselves tying eligibility for medical benefits to eligibility for life-time pension benefits:

> The district court cites provisions in each of the [collective bargaining agreements] at issue which tie retiree and surviving spouse eligibility for health in-

> surance coverage to eligibility for vested pension benefits. Since retirees are eligible to receive pension benefits for life, the court found that the parties intended that the company provide lifetime health benefits as well. (Pet. App. 13a).

The Sixth Circuit also found that the district court's reading of the labor agreement language was supported by language from the Summary Plan Description, which specifically stated that medical benefits for certain retirees were "lifetime" benefits:

> The district court also notes language from the summary plan descriptions (SPD's) . . . which indicates that the company guarantees health benefits. A provision of one SPD provides that those employees who retire *without* pension eligibility because they have not been with the company long enough to participate in the pension plan will, nonetheless, have *lifetime* health coverage at no cost. The defendants argue that because the SPD's specifically provide lifetime health insurance benefits for these retirees only, such benefits were not intended for any other retirees.
>
> The plaintiffs argue the contrary. They assert that this specific language was necessary because these retirees do not have lifetime pension benefits to which to tie eligibility for health coverage, as do all the other retirees. The plaintiffs contend that the parties included this specific language to assure that those retirees who are ineligible for pension benefits still receive lifetime health care coverage. We find plaintiffs' argument more persuasive; it would be anomalous for the defendant to guarantee lifetime health coverage to retirees with only a couple of years of service while neglecting to provide equal benefits to pensioners with dozens of years of service. (Pet. App. 13a-14a). (emphasis in original.)

Finally, the Sixth Circuit agreed with the district court that Kelsey-Hayes' conduct following the 1987 sale of the divisions was inconsistent with Kelsey-Hayes' current ar-

gument that the benefits are subject to termination at any time. (Pet. App. 14a).

In short, the Sixth Circuit interpreted the disputed contractual provisions and agreed that the retirees were likely to succeed on their claim that the intent of the parties to the labor agreements was to provide for benefits during the retirees' entire retirement, rather than leave those benefits to the whim of the Company.

Neither the district court nor the Sixth Circuit has yet reached a final decision on this contract interpretation question. Each decided only that the retirees had demonstrated the requisite "likelihood of success on the merits" to warrant issuance of a preliminary injunction maintaining the benefits during the litigation. Discovery continues and the case has not yet been scheduled for trial.

REASONS FOR DENYING THE WRIT

The issue here can simply be stated: did Kelsey-Hayes, through its collective bargaining agreements with the UAW, agree to provide medical coverage to its UAW-represented retirees throughout their retirement. It is beyond dispute that, if Kelsey-Hayes did so obligate itself, the retirees are permitted to enforce that contractual obligation under both § 301 of the LMRA and § 502(a)(1)(B) of ERISA.

The question presented below, and raised in the Cross-Petition, is the extremely fact-intensive inquiry into whether Kelsey-Hayes in fact did so obligate itself. This question is nothing more than a routine, albeit factually-complicated, exercise in contract interpretation. Since the contracts at issue cover several separate facilities, were first negotiated more than 30 years ago, have been periodically re-negotiated since that time, and have been the subject of literally thousands of communications between Kelsey-Hayes and its employees and retirees, the inquiry will necessarily require the sifting of a great deal of evidence in order to determine the intent of the parties.

At this stage, neither the district court nor the Sixth Circuit has made a final determination on this question of contract interpretation. Instead, all that has occurred to date is that the district court has granted the retirees a preliminary injunction based on its determination that the retirees are likely to succeed on the merits of this contract interpretation question. The Sixth Circuit found that the district court did not abuse its discretion in granting that preliminary injunction. But this decision is, of course, preliminary. The parties have since engaged in extensive discovery. To date, over 30 depositions have been taken, and over 7500 documents have been produced. No trial date has been set. No final determination as to the meaning of the contract has been made by either the district court or the Sixth Circuit.

The Sixth Circuit did not depart from established precedent, or engender any conflict among the lower courts, when it applied traditional contract interpretation rules to address the question of whether the retirees here are "likely" to succeed on the contract interpretation question that will ultimately be posed in this case. Given that no final decision interpreting the contract has been rendered, this case is particularly unworthy of review in its current posture.

I. THE SIXTH CIRCUIT'S DECISION IS NOT IN CONFLICT WITH PRIOR DECISIONS OF THIS COURT OR THE DECISIONS OF ANY OTHER CIRCUIT.

1. The court below engaged in nothing more than a garden-variety exercise in contract interpretation. The court examined the language of the contract, the conduct of the parties, and other evidence of intent and concluded that the retirees had demonstrated the requisite "likelihood of success on the merits" on the question of whether the intent of the parties was to obligate Kelsey-Hayes to continue to provide medical benefits to retirees throughout their retirement years.

Kelsey-Hayes' Cross-Petition is, in its entirety, based on a fundamental misunderstanding of the nature of the Sixth Circuit's decision. In its strained effort to manufacture a division of authority on this question, Kelsey-Hayes attributes to the Sixth Circuit an analysis that it did not adopt: that a commitment to provide lifetime medical benefits may be "inferred . . . based solely on the plaintiffs' 'status' as retirees, and not on any term of the benefit plan documents." (Cross-Pet. 8) Based on this misunderstanding, Kelsey-Hayes accuses the Sixth Circuit of holding that "ERISA principles do not apply to this case" and "disregard[ing] controlling Supreme Court precedent." (Cross-Pet. 8).

Of course, the Sixth Circuit did nothing of the sort. The Sixth Circuit did not hold that contractual silence results in interminable benefits. Nor did the Sixth Circuit shift the burden of proof to Kelsey-Hayes. Instead, the Sixth Circuit merely applied traditional contract interpretation rules and examined the relevant contract language, as well as the conduct of the parties and representations made by Kelsey-Hayes to the retirees. Based on this evidence—and not on any "inference" or other burden-shifting device—the Sixth Circuit concluded that the retirees were "likely" to succeed in proving at trial that Kelsey-Hayes had entered into a contract to provide retirees with medical benefits throughout their retirement years.

The quotidian nature of the Sixth Circuit's decision is best demonstrated—and the Cross-Petitioner's claims about that decision are best refuted—by reviewing the text of the Sixth Circuit decision. Thus, the Sixth Circuit explicitly held that applicable precedent "does not shift the burden of proof to the employer, nor does it require specific anti-vesting language before a court can find that the parties did not intend benefits to vest." (Pet. App. 12a). In accord with every other decision to address this issue, the Sixth Circuit framed its analysis by putting the burden of proof squarely on the retirees, and

requiring that the retirees show, through "basic rules of contract construction," that the agreements at issue obligated Kelsey-Hayes to provide the benefits for the duration of retirement. (Pet. App. 8a). As the Sixth Circuit stated,

> [t]o prove this, the plaintiffs must show that the defendant and the union intended to include a right to lifetime benefits when they negotiated the [collective bargaining agreements] at issue here. There is no statutory right to lifetime health benefits. If such a right exists, it exists because the parties agreed "to vest a welfare benefit plan." (Pet. App. 7a) (quoting *Boyer v. Douglas Components Corp.*, 986 F.2d 999, 1005 (6th Cir. 1993) (footnote omitted).

The Sixth Circuit also noted that "whether benefits survive the termination of a CBA depends on the intent of the parties" (Pet. App. 8a). And the court below specifically endorsed that the Sixth Circuit's earlier holding in *UAW v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984), that

> "retiree benefits are [not] necessarily interminable by their nature. Nor does any federal labor policy . . . presumptively favor the finding of interminable rights to retiree insurance benefits when the collective bargaining agreement is silent." (Pet. App. 9a) (quoting *UAW v. Yard-Man, Inc.*, 716 F.2d at 1482).

Cross-Petitioner is thus simply wrong when it claims that the court below "inferred that health benefits vest on retirement based solely on the plaintiffs' status as retirees." (Cross-Pet. 8). As the decision itself makes clear, the Sixth Circuit "inferred" no such thing.

In short, the Sixth Circuit applied hornbook contract law principles to the contract interpretation question posed here. Cross-Petitioner lost the motion on the facts, not on the law. And there is no reason why this Court should review the factual determinations of the lower court, particularly in view of the fact that those factual determinations are, at this stage, only preliminary.

2. It is a bit difficult to understand what Cross-Petitioner is getting at when it accuses the Sixth Circuit of holding that "ERISA principles do not apply to this case." (Cross-Pet. 8). The court below did not express anything even resembling this statement.

To be sure, ERISA does not *require* the vesting of retiree health benefits. But neither does ERISA *prohibit* contractual commitments to provide medical benefits for any particular duration. As this court stated in *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 732 (1985), "[ERISA] does not regulate the substantive content of welfare-benefit plans." In short, ERISA leaves that question to the parties.[3]

Cross-Petitioner apparently believes that ERISA's neutrality on this subject should form a shield that employers can use when their employees or retirees seek to enforce contractual promises. But the fact that ERISA does not mandate any particular duration—and instead leaves that decision to the parties—does not throw a cross light on efforts by retirees to enforce the promises that have been made. Contracting systems, after all, are not about copy-

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[3] Cross-Petitioner argues that ERISA supplants § 301 of the Labor Management Relations Act when welfare benefits are involved and that federal policy under ERISA rather than federal policy under the LMRA controls. Of course, because ERISA does not regulate the substance of welfare benefit plans, it is difficult to determine what that policy would be, if not federal labor policy developed under § 301. Every circuit which has specifically addressed the specific issue has relied on § 301 as the source of the applicable federal common law. *Stewart v. KHD Deutz of America Corp.*, 75 F.3d 1522, 1526 (11th Cir. 1996); *Bidlack v. Wheelabrator Corp.*, 993 F.2d 603, 604 (7th Cir.), *cert. denied*, 114 S.Ct. 291 (1993); *Armistead v. Vernitron Corp.*, 944 F.2d 1287, 1298 (6th Cir. 1991); *Paperworkers v. Champion International Corp.*, 908 F.2d 1252, 1255-56 (5th Cir. 1990); *Keffer v. H.K. Porter Co., Inc.*, 872 F.2d 60, 62 (4th Cir. 1989). There is no conflict in the Courts of Appeal on this or any other issue relevant to the decision of the court below.

ing rights and obligations already established by public law. Instead, the purpose of contracts is to establish rights and obligations on matters that are *not* settled by public law.

When an employer promises its employees that, upon their retirement, they will continue to receive medical coverage for the duration of their retirement, that employer is entering into a contract which is not mandated by ERISA. But nothing about ERISA suggests that retirees should be precluded from enforcing that promise. And when the parties disagree about whether such a promise was made, nothing in ERISA creates additional hurdles for the retirees to clear in their effort to show that such a promise was extended. Instead, as all circuits have recognized, ordinary contract principles will guide the courts in determining the terms of the applicable contract.

For example, as the Eighth Circuit held, ERISA "allows the parties to determine the duration of the welfare benefits. Thus, the issue is 'simply one of contract interpretation.'" *Anderson v. Alpha Portland Industies, Inc.*, 836 F.2d 1512, 1516 (8th Cir. 1988), *cert. denied*, 489 U.S. 1051 (1989) (quoting Local 105-A, *Food & Commercial Workers v. Dubuque Packing Co.*, 756 F.2d 66, 70 (8th Cir. 1985). And, as the Eleventh Circuit succinctly put it, "[b]ecause federal labor policy neither favors nor disfavors the vesting of retirees' health benefits . . . we apply traditional rules of contractual interpretation." *Stewart v. KHD Deutz of America Corp.*, 980 F.2d 698, 702 (11th Cir. 1993) (citations omitted).

Cross-Respondents have not found a single case that supports Cross-Petitioner's suggestion that ERISA's neutrality on the question of contractual commitments to maintain welfare benefit plans for a specific duration somehow poisons the well when retirees seek to enforce these contractual promises. Instead, the circuits have had

no difficult in unanimously concluding that traditional contract principles govern the resolution of these disputes.

3. Cross-Petitioner also asserts that the decision below conflicts with three prior decisions of this Court. *Litton Financial Printing Div. v. NLRB*, 501 U.S. 190 (1991), *Laborers Health & Welfare Fund v. Advanced Lightweight Concrete Co., Inc.*, 484 U.S. 539 (1988), and *Curtiss-Wright Corp. v. Schoonejongen*, 115 S.Ct. 1223 (1995). Cross-Petitioner is entirely incorrect.

In *Litton* the Court stated:

> [C]ontractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement. *Exceptions are determined by contract interpretation. Rights which accrued or vested under the agreement will, as a general rule, survive termination of the agreement.* And of course, if a collective bargaining agreement provides in explicit terms that certain benefits continue after the agreement's expiration, disputes as to such continuing benefits may be found to arise under the agreement . . . 501 U.S. at 207-08 (emphasis added)

Litton thus makes plain that "[e]xceptions" to the general rule—i.e. situations where contractual obligations will survive termination of the agreement that creates them—"are determined by contract interpretation." *Id.* In other words, if a court determines that the parties intended a particular obligation to extend beyond the termination of the agreement, that intent will be given effect. In addition, the Court made clear that "[r]ights which accrued or vested under the agreement will, as a general rule, survive termination of the agreement." *Id.*

This is precisely the analysis followed by the Sixth Circuit, and by every other court to address the question of retiree health benefits. The court below recognized that there is both a general rule that obligations do not ordinarily survive the expiration of a collective bargaining

agreement, and an exception for "accrued or vested" rights, which "as a general matter" do outlive the agreement. The task for the district court here was to determine whether the benefits at issue were subject to the general rule or to the exception. As the Sixth Circuit recognized, resolving that question by reference to traditional methods of contract interpretation is precisely what *Litton* requires. (Pet. App. 11a). *Accord Bidlack v. Wheelabrator Corp.*, 993 F.2d 603, 607-08 (7th Cir.) (en banc), *cert. denied*, 114 S.Ct. 291 (1993) (citing *Litton* in support of resort to rules of contract interpretation to determine duration of promise to provide retiree medical benefits). And that is what the district court will do in this case when the time comes for a final determination on the meaning of the contracts at issue.

In *Advanced Lightweight*, the issue before the Court had nothing to do with a claim of continued *contractual* obligations. Instead, the pension plan trustees there were attempting to enforce a *statutory* duty, derived from the duty to bargain under the National Labor Relations Act. 484 U.S. at 542-43. In holding that the trustees did not have the statutory authority to enforce that statutory obligation, the Court did not address whether a company may enter into a *contract* which create obligations that survive that contract's expiration. As the Sixth Circuit recognized, *Advanced Lightweight* says nothing about the issues in this case. (Pet. App. 12a).

Finally, the Court's decision is *Schoonejongen* does not conflict with the decision below. In *Schoonejongen*, no claim was even advanced that the employer, through contract or otherwise, had promised benefits for any particular duration. Instead, the lower courts had already determined that no such promise had been made. That determination was not challenged before this Court. 115 S.Ct. at 1227.

The question in *Schoonejongen*, instead, was whether the *procedure* for making amendments to the benefit

plans complied with Section 402(b)(3) of ERISA, which establishes certain minimal requirements for such procedures. 115 S.Ct. at 1226. In reaching the conclusion that the procedure at issue there complied with ERISA, the Court merely re-affirmed the basic principle that, absent evidence of commitments to the contrary, an employer generally has the right to modify or terminate its employee medical benefit plans. Nowhere in the decision, however, does *Schoonejongen* even suggest that ERISA permits an employer to disregard its contractual commitments to its retirees, or that ERISA puts a thumb on the scales in the employer's favor when the scope of an employer's contractual commitments is in dispute. Instead, *Schoonejongen* merely confirms the basic premise—which is not in dispute here—that an employer who does *not* make a commitment to continue a benefit plan in effect for any particular duration is not required by ERISA to continue that plan for any specific duration.

But, of course, that observation merely *raises* the question of contract interpretation at issue here: whether the employer in fact obligated itself to provide medical benefits to retirees throughout their retirement years, or whether it retained the right to terminate those benefis at will. The lower courts have unanimously concluded that that question must be answered by applying traditional principles of contract interpretation. Nothing in *Schoonejongen* undermines that conclusion in the slightest.

4. Cross-Petitioner argues that the decision below is in conflict with the decisions of three other circuits. Again, Cross-Respondents argument is based entirely on a fundamental misunderstanding of the reasoning of the court below. As demonstrated, the court below did not rely on any "presumption" or "inference" of lifetime benefits in order to reach its conclusion. Instead, the court merely engaged in a garden-variety exercise in contract interpretation, keeping the burden of proof at all times on the party seeking to establish the existence of the promise

(i.e. the retirees). This approach has been universally endorsed by the courts of appeals to address the question, including the cases cited by Cross-Petitioner. None of the five cases cited by Cross-Petitioners conflicts in any way with the legal approach taken by the Sixth Circuit in the present case.

In *Paperworkers v. Champion International Corp.*, 908 F.2d 1252 (5th Cir. 1990) the Fifth Circuit endorsed traditional contract interpretation principles to resolve questions such as that presented here. The court, in fact, reviewed a number of decisions by other court of appeals, including the Sixth Circuit's decision in *UAW v. Yard-Man* and noted that "[i]n each case the court looked to the specific agreement in question to discern whether there was an intent to confer lifetime health insurance benefits on the covered retirees." 908 F.2d at 1261. The court agreed with this approach adopted by other courts, and remanded the case to the district court "to determine whether there was an intent to vest the benefits with each retiree . . . ." *Id.* Nothing about this approach is contrary to the decision below, or to the decision of any other circuit.[4]

The Eighth Circuit cases of *John Morrell & Co. v. Food and Commercial Workers*, 37 F.3d 1302 (8th Cir. 1994), *cert. denied*, 115 S.Ct. 2251 (1995), and *Anderson v. Alpha Portland Industries, Inc.*, 836 F.2d 1512 (8th Cir. 1988), *cert. denied*, 489 U.S. 1051 (1989), are equally unhelpful to Cross-Petitioner's cause here.

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[4] In a footnote, the Fifth Circuit also noted that it disagreed with *Yard-Man* "[t]o the extent that" *Yard-Man* mandated a burden-shifting "inference" or "presumption" of lifetime benefits. 908 F.2d at 1261 n.12. Of course, neither *Yard-Man* nor the decision below in fact indulges in any such burden-shifting device. Instead, as both the *Champion* court and the court below held, the contract interpretation question posed by these cases is answered by applying traditional principles of contract construction to "determine whether there was an intent to vest the benefits." 908 F.2d at 1261.

In *Alpha Portland*, in fact, the Eighth Circuit understood that the Sixth Circuit "in *Yard-Man* recognized that no federal labor policy presumptively favors vesting" and that "[b]ecause Congress has taken a neutral position on this issue," the issue is "simply one of contract interpretation." 836 F.2d at 1517 (quoting *Local 105-A, Food & Commercial Workers v. Dubuque Packing Co.*, 756 F.2d 66, 70 (8th Cir. 1985)). In fact, the Eighth Circuit pointed out in *Alpha Portland* that the Sixth Circuit has expressly disavowed any intent to engage in burden-shifting when "[s]hortly after *Yard-Man* was decided . . . the Sixth Circuit stated that 'there is no legal presumption based on the status of retired employees.'" 836 F.2d at 1516 (quoting *UAW v. Cadillac Malleable Iron Co., Inc.*, 728 F.2d 807, 808 (6th Cir. 1984).

In *Morrell*, the Eighth Circuit noted that the "case turns on whether vested health benefits were contractually conferred in the [labor agreements]. The Union has the burden of proof on this issue." 37 F.3d at 1304. There is, of course, nothing at all controversial about this proposition.

Finally, Judge Posner's decision in the Seventh Circuit's *en banc* decision in *Bidlack v. Wheelabrator Corp.*, 993 F.2d 603 (7th Cir.), *cert. denied*, 114 S.Ct. 291 (1993) agrees entirely with the analysis adopted by the court below as well as every circuit to address the question: retirees bear the burden of establishing a contractual commitment in accordance with traditional principles of contract construction. 993 F.2d at 607-09. The only reference to *Yard-Man* in Judge Posner's opinion is a favorable reference in support of the proposition that ERISA "does not forbid . . . vesting [of retiree medical benefits] by a written contract which could be part of a collective bargaining agreement." 993 F.2d at 605. This does not exhibit any conflict with the decision below.

Given this unanimity of opinion in the lower courts on the basic legal principles applicable to these cases—as well as the intensely factual nature of these inquiries—it is not at all surprising that the Court has denied *certiorari* at least 13 times in recent years in cases presenting the question of whether an employer had made a commitment to continue retiree medical benefits for any particular duration. *Gable v. Sweetheart Cup Co., Inc.*, 35 F.3d 851 (4th Cir. 1994), *cert. denied*, 115 S.Ct. 1442 (1995); *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929 (5th Cir.), *cert. denied*, 114 S.Ct. 196 (1993); *Bidlack v. Wheelabrator Corp.*, 993 F.2d 603 (7th Cir.), *cert. denied*, 114 S.Ct. 291 (1993); *Senn v. United Dominion Industries, Inc.*, 951 F.2d 806 (7th Cir. 1992), *cert. denied*, 509 U.S. 903 (1993); *Musto v. American General Corp.*, 861 F.2d 897 (6th Cir. 1988), *cert. denied*, 490 U.S. 1020 (1989); *Policy v. Powell Pressed Steel Co.*, 770 F.2d 609 (6th Cir. 1985), *cert. denied*, 475 U.S. 1017 (1986); *Adams v. Avondale Industries, Inc.*, 905 F.2d 943 (6th Cir.), *cert. denied*, 498 U.S. 984 (1990); *UAW v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984); *Jensen v. SIPCO, Inc.*, 38 F.2d 945 (8th Cir. 1994), *cert. denied*, 115 S.Ct. 1428 (1995); *John Morrell & Co. v. Food and Commercial Workers*, 37 F.3d 1302 (8th Cir. 1994), *cert. denied*, 115 S.Ct. 2251 (1995); *Anderson v. Alpha Portland Industries, Inc.*, 836 F.2d 1512 (8th Cir. 1988), *cert. denied*, 489 U.S. 1051 (1989); *Alday v. Container Corp.*, 906 F.2d 660 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991); *Steelworkers v. Connors Steel Co.*, 855 F.2d 1499 (11th Cir. 1988), *cert. denied*, 489 U.S. 1096 (1989). In each of these cases, the lower courts simply applied traditional rules of contract interpretation in order to resolve a dispute regarding the intended duration of retiree medical benefits. Because the decision below adheres to rather than departs from these established principles, there is no cause or necessity for review by the Court.

In short, every case to examine the question—including those cited by Cross-Petitioner—has reached the same conclusion: traditional rules of contract interpretation will be used to determine the scope of an employer's promise regarding the duration of retiree medical benefits. Given this unanimity of approach, there is no reason for review by this Court, particularly in view of the fact that the court below has not even rendered a final decision on the meaning of the contract language at issue here.

II. THE PRELIMINARY INJUNCTION DECISION BY THE COURT BELOW IS AN INTERLOCUTORY DECISION, AND THEREFORE PARTICULARLY INAPPROPRIATE FOR REVIEW.

As already noted, the court below has not reached a final decision on the contract interpretation question presented by this case. Instead, it has thus far only reviewed the necessarily truncated presentation of evidence that was possible in connection with the retirees' motion for preliminary injunction, filed barely six weeks after the Complaint was filed. Based on that presentation of the evidence available to the retirees at that time, the court below concluded that the retirees had demonstrated the requisite "likelihood of probability of sucsess on the merits." But that finding is only preliminary.

The parties have conducted extensive discovery since the preliminary injunction hearing. That discovery includes more than 30 depositions and over 7500 separate documents to date. That evidence was not available at the preliminary injunction hearing, and has yet to be reviewed by the court below.

The decision by the court below is, at this stage, therefore entirely interlocutory. Following the close of discovery, a final determination will be made as to the meaning of the disputed provisions of the contract. There is no reason for this Court to intercede on a question of contract

interpretation before the district court has even rendered a final decision on that question.[5]

The Court has long disfavored the grant of *certiorari* with respect to interlocutory decisions. *American Construction Co. v. Jacksonville T. & K.W.R. Co.*, 148 U.S. 372, 384 (1893); *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*, 240 U.S. 251, 258 (1916) (*certiorari* should be granted as to interlocutory decisions only in "extraordinary" cases); *Locomotive Firemen v. Bangor & A.R. Co.*, 389 U.S. 327, 328 (1967).

This case, in fact, demonstrates plainly the wisdom of this rule. If the Court were to accept review now, it would be required to decide the case on a record developed over the course of only six weeks, and would be deprived of the benefit of the extensive additional discovery that has occurred since then. More importantly, the Court would be reviewing only a preliminary determination that one party is "likely" to prevail on the merits. And that determination, by its terms, will govern the parties only until a final decision on the merits of the case can be rendered. There is simply no reason for the Court to review a case in this posture.

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[5] The jury trial question is presented in the retirees' Petition for Writ of Certiorari in Case No. 95-1674 does not suffer from the same defect. The question there is whether the issue will be tried to a jury or to the district judge in the upcoming trial. That question is purely legal; there is no need to await the gathering of additional evidence, or the district court's contract interpretation decision. Instead, on the jury trial question, both the district court and the Sixth Circuit have rendered final decisions and there is no reason to delay review of that important constitutional question in this Court.

CONCLUSION

For the foregoing reasons, the cross-petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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Dated: June 17, 1996